

December 2020

## Direct Marketing Association v. Brohl: Stranded on a Precedential Island

Kristin L. Arthur

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Kristin L. Arthur, Direct Marketing Association v. Brohl: Stranded on a Precedential Island, 94 Denv. L. Rev. 627 (2017).

This Note is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

# DIRECT MARKETING ASSOCIATION *V.* BROHL: STRANDED ON A PRECEDENTIAL ISLAND

## TABLE OF CONTENTS

INTRODUCTION.....	627
I. BACKGROUND.....	629
<i>A. Dormant Commerce Clause Jurisprudence</i> .....	629
<i>B. Colorado Sales and Use Taxes</i> .....	630
<i>C. The Dormant Commerce Clause Doctrine and Taxation</i> .....	630
<i>D. Quill Corp. v. North Dakota</i> .....	631
<i>E. Removing Precedent</i> .....	632
1. Judicial Overruling.....	633
2. Legislative Overruling .....	634
<i>F. Narrowing Precedent</i> .....	635
II. <i>DIRECT MARKETING ASSOCIATION V. BROHL</i> .....	636
<i>A. Facts and Procedural History</i> .....	636
<i>B. Opinion of the Court</i> .....	638
1. Distinguishing <i>Quill</i> .....	638
2. DMA's Claims .....	639
a. Impermissible Discrimination .....	639
b. Undue Burden .....	640
3. Conclusion.....	641
<i>C. Concurring Opinion</i> .....	641
III. ANALYSIS .....	644
<i>A. The Formation of Quill's Precedential Island</i> .....	644
1. <i>Quill</i> Should Be Overruled.....	644
2. <i>Quill</i> Will Not Be Overruled Judicially .....	645
3. <i>Quill</i> Will Not Be Overruled Legislatively .....	646
4. The Island of <i>Quill</i> is Formed .....	647
<i>B. The Rise of Precedential Islands</i> .....	647
CONCLUSION .....	649

## INTRODUCTION

Precedence is the guiding principle of American jurisprudence.<sup>1</sup> It is the foundational element of common law.<sup>2</sup> This adherence to past decisions, eloquently titled *stare decisis*, “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

---

1. See, e.g., *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (“[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.”) (italics in original).

2. See, e.g., Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) (“[R]eliance on precedent is one of the distinctive features of the American judicial system.”).

judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>3</sup> However, stare decisis is not without its downfalls, particularly its inherent inflexibility. Inflexible adherence to outdated precedent can cause unjust outcomes, and there are limited ways to remove a precedent once it is in place—either the Supreme Court can overrule itself;<sup>4</sup> the legislature can write legislation nullifying the precedent;<sup>5</sup> or, in constitutional cases, the Constitution can be amended.<sup>6</sup>

*Direct Marketing Association v. Brohl*<sup>7</sup> involves the application of the dormant Commerce Clause doctrine to Colorado’s efforts to improve use tax collection on sales by out-of-state retailers.<sup>8</sup> While taxation under the dormant Commerce Clause doctrine is a unique issue, this case reveals a more systemic issue. Using the Tenth Circuit’s opinion in *Direct Marketing Association*, this Case Comment will argue that increasingly rapid change and a failure of the legislative check may begin to hinder the effectiveness of stare decisis. By chipping away at precedent that it cannot overturn, courts create a sea of “precedential islands,”<sup>9</sup> or cases that are binding only on their exact factual scenarios. If more and more precedential islands arise, judicial decisions may become less predictable and consistent, thus decreasing judicial efficiency and increasing the number of possible traps for future courts and legal professionals to fall into.

Part I of this Comment gives a brief background of the underlying legal issue in this case—the dormant Commerce Clause doctrine and its applicability to taxation—as well as an overview of how precedent is removed in our system of government. Next, Part II summarizes the Tenth Circuit’s decision in *Direct Marketing Association*. Finally, Part III utilizes the Tenth Circuit’s distinction between *Quill Corp. v. North Dakota*<sup>10</sup> and *Direct Marketing Association* as an example of how a precedential island forms and discusses why these islands may increase in number and the possible implications of their proliferation: namely, the weakening of stare decisis.

---

3. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

4. *See, e.g.,* *Minturn v. Maynard*, 58 U.S. 477 (1854), *overruled by* *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, (1991).

5. *See, e.g.,* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

6. *See, e.g.,* *Chisholm v. Georgia*, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

7. *Direct Mktg. Ass’n v. Brohl* (*Direct Mktg. Ass’n IV*), 814 F.3d 1129 (10th Cir. 2016).

8. *Id.* at 1132.

9. *Id.* at 1151 (Gorsuch, J., concurring).

10. 504 U.S. 298 (1992).

## I. BACKGROUND

A. *Dormant Commerce Clause Jurisprudence*

Direct Marketing Association's (DMA) claim before the Tenth Circuit is rooted in the dormant Commerce Clause, specifically in its applicability to state taxation.<sup>11</sup> The dormant Commerce Clause is not written into the Constitution, but derives from the Commerce Clause itself.<sup>12</sup> The Commerce Clause gives Congress the ultimate power to regulate interstate commerce; even though state and local governments can pass legislation regulating commerce, those governments can do nothing to stop Congress from preempting that legislation if it so chooses.<sup>13</sup> The notion of commerce, as well as commerce itself, has grown dramatically since the Constitution's drafting, prompting the judicial creation of the dormant (or negative) Commerce Clause doctrine in the early 1800s.<sup>14</sup> The doctrine arises from the idea that a grant of interstate commerce power to Congress implies a restriction of interstate commerce power on the states.<sup>15</sup> Therefore, if a state enacts a law or regulation that discriminates against or unduly burdens interstate commerce, the judiciary will use the dormant Commerce Clause doctrine to invalidate the action.<sup>16</sup> "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."<sup>17</sup>

When applying a dormant Commerce Clause analysis, the focus is on "whether a state law improperly interferes with interstate commerce."<sup>18</sup> There are two ways a state law can interfere with interstate commerce: (1) by discriminating against interstate commerce or (2) by unduly burdening interstate commerce.<sup>19</sup> A state law that discriminates must pass the strictest scrutiny, only surviving if the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>20</sup> A state law that burdens interstate commerce will only be invalidated if the burden imposed on interstate commerce clearly outweighs the local benefits of the law.<sup>21</sup>

---

11. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132.

12. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 455–56 (4th ed. 2013).

13. See U.S. CONST. art. I, § 8, cl. 3.

14. See *Direct Mktg. Ass'n IV*, 814 F.3d at 1135.

15. *Id.*

16. *Id.* at 1136.

17. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

18. *Direct Mktg. Ass'n IV*, 814 F.3d at 1135.

19. *Id.* at 1136.

20. *Id.* (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997)).

21. See *id.*

### B. Colorado Sales and Use Taxes

Colorado has utilized sales and use taxes as a means of generating revenue since the mid-1930s.<sup>22</sup> Colorado residents are required to pay either sales tax or use tax on their purchases, but not both.<sup>23</sup> "A sales tax is imposed on retail transactions or purchases that occur within [Colorado]."<sup>24</sup> The Colorado Department of Revenue requires in-state retailers to calculate, collect, and remit sales tax.<sup>25</sup> Consequently, Coloradans are accustomed to paying sales tax—the state has a 98.3% sales tax compliance rate.<sup>26</sup>

Use tax, however, is slightly different. "A 'use' tax, sometimes referred to as a 'compensating' tax, taxes the privilege of using, storing, or otherwise consuming tangible personal property or services, usually at a rate equivalent to the sales tax."<sup>27</sup> "A use tax is designed to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices."<sup>28</sup> For example, a Colorado resident purchasing a \$2,000 computer in Delaware, which has no sales tax, would save himself approximately \$175 in sales tax. However, the way the tax system is set up, he would owe an equivalent use tax to the Colorado Department of Revenue. Generally, the requirement of calculating and remitting these use taxes falls to the purchaser.<sup>29</sup> The combination of these two taxes is meant to create a steady stream of revenue from all purchases made by Colorado residents, regardless of where the purchase occurred.<sup>30</sup> Nevertheless, even though they are legally required to do so, most Coloradans do not pay their use taxes<sup>31</sup>—the state has a 4% use tax compliance rate.<sup>32</sup>

### C. The Dormant Commerce Clause Doctrine and Taxation

Over the past fifty years, jurisprudence specific to taxation under the dormant Commerce Clause doctrine has developed.<sup>33</sup> The Court ar-

---

22. *Id.* at 1132.

23. *Id.*

24. 67B AM. JUR. 2D *Sales and Use Taxes* § 1 (2017).

25. *See* COLO. REV. STAT. §§ 39-26-101 to -129 (2016) (codification of Colorado's sales tax collection and remittance scheme).

26. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132 n.1.

27. *Sales and Use Taxes*, *supra* note 24, § 134.

28. *Id.*

29. COLO. REV. STAT. § 39-26-204(1)(a). There are a few instances when the collection of use tax falls to the retailer, but they are the exception. *Id.* § 39-26-204(2). Additionally, the use tax on items that the state requires to be registered, such as cars, is usually paid at the time of registration. *See id.* § 39-26-113.

30. *See Sales and Use Taxes*, *supra* note 24, § 134.

31. *Direct Mktg. Ass'n IV*, 814 F.3d at 1132.

32. *Id.* at 1132 n.1.

33. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 756-57 (1967); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 274 (1977).

articulated a framework in 1977,<sup>34</sup> holding that a tax on an out-of-state entity will be upheld if it “[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.”<sup>35</sup> The “substantial nexus” requirement is minimal “and is established if the taxed entity ‘avails itself of the substantial privilege of carrying on business within the State,’ but the Court has held that an entity lacking a physical presence within a state but mailing goods into it from outside is *not* connected to the state by such a nexus.”<sup>36</sup>

The “physical presence” requirement was expressed in 1967, prior to the establishment of the modern framework. The Supreme Court, in *National Bellas Hess, Inc. v. Department of Revenue*,<sup>37</sup> addressed whether Illinois could require a Delaware-based mail-order business with no physical presence in Illinois to collect and remit use taxes on sales to Illinois customers.<sup>38</sup> The Court held that Illinois could not require Bellas Hess to collect use tax, stating that Illinois may not “impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.”<sup>39</sup>

Although the Court did not reference *Bellas Hess* when first announcing the taxation framework in 1977,<sup>40</sup> the Court has since specifically noted that it did not overrule its holding.<sup>41</sup> Rather, “*Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”<sup>42</sup> *Bellas Hess*’s holding was integrated into the taxation framework as applied in *Quill Corp. v. North Dakota*.<sup>43</sup>

#### *D. Quill Corp. v. North Dakota*

Twenty-five years after *Bellas Hess*, the *Quill* Court used the proposition it established to create a bright-line rule.<sup>44</sup> The facts of *Quill* are the same as *Bellas Hess*: they “involv[ed] a State’s attempt to require an out-of-state mail-order house that has neither outlets nor sales representa-

34. See *Complete Auto Transit, Inc.*, 430 U.S. at 279.

35. *Id.*

36. Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 268–69 (2017) (emphasis in original) (quoting *Exxon Corp. v. Wis. Dep’t of Revenue*, 447 U.S. 207, 220 (1980) (internal quotations omitted))).

37. 386 U.S. 753 (1967).

38. *Id.* at 754–56.

39. *Id.* at 758.

40. *Complete Auto Transit, Inc.*, 430 U.S. at 274, 279.

41. *Quill Corp. v. North Dakota*, 504 U.S. 298, 311–12 (1992).

42. *Id.* at 311.

43. *Id.*

44. *Id.* at 317–18.

tives in the State to collect and pay use tax on goods purchased for use within the State.”<sup>45</sup>

The Supreme Court of North Dakota “declined to follow *Bellas Hess* because ‘the tremendous social, economic, commercial, and legal innovations’ of the past quarter-century have rendered its holding ‘obsolete.’”<sup>46</sup> While the Supreme Court “agree[d] with much of the state court’s reasoning,” it declined to come to the same conclusion.<sup>47</sup>

The Court determined that “the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate[d] that the *Bellas Hess* rule remain[ed] good law” and declined to overturn *Bellas Hess*.<sup>48</sup> The conviction in the Court’s holding is belied by the opinion’s conclusion, in which the Court stated: “[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”<sup>49</sup>

*Quill* was decided in 1992, the same year AOL was released for Windows.<sup>50</sup> At that time, *Quill* protected the relatively small mail-order industry, which totaled only \$180 billion. Throughout the next the twenty-five years the Internet grew exponentially, and *Quill*’s bright-line rule now protects a \$3.16 trillion industry and is causing “a serious, continuing injustice” to the states.<sup>51</sup>

### *E. Removing Precedent*

When courts want to remove precedent, they have traditionally had two options. Courts can either overrule their previous precedent or they can call, implicitly or explicitly, for legislative intervention.<sup>52</sup> Courts are hesitant to overrule themselves; a high threshold must be passed in order

---

45. *Id.* at 301.

46. *Id.* (quoting *Quill Corp. v. North Dakota*, 470 N.W.2d 203, 208 (N.D. 1991), *rev’d*, 504 U.S. 298 (1992)).

47. *Id.* at 302.

48. *Id.* at 317 (*italics in original*).

49. *Id.* at 318.

50. David Lumb, *A Brief History of AOL*, FAST COMPANY (May 12, 2015, 1:15 PM), <https://www.fastcompany.com/3046194/fast-feed/a-brief-history-of-aol>.

51. *Direct Mktg. Ass’n v. Brohl (Direct Mktg. Ass’n III)*, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring).

52. See, e.g., Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST (May 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html>; see also Richard L. Hansen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. Cal. L. Rev. 205, 208 (2012); James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1092 (2001).

for this to happen.<sup>53</sup> In order for legislative intervention to be effective, the country must have a functioning legislature.

### 1. Judicial Overruling

It is not easy to overrule past precedent. “The Court has said often and with great emphasis that ‘the doctrine of *stare decisis* is of fundamental importance to the rule of law.’”<sup>54</sup> “[S]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”<sup>55</sup> It “ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.”<sup>56</sup> *Stare decisis* promotes “clarity, stability, and predictability in the law, efficiency, legitimacy, and fairness and impartiality.”<sup>57</sup> Courts have overruled prior decisions only “where the necessity and propriety of doing so has been established.”<sup>58</sup> This practice is rare, however, as “any departure from the doctrine of *stare decisis* demands special justification.”<sup>59</sup> Since its inception in 1789 until 2010, the Supreme Court has explicitly overruled prior decisions 236 times, or approximately one per year.<sup>60</sup>

“The overruling of a precedent, despite its infrequency . . . represents a dramatic form of legal change.”<sup>61</sup> The Court, therefore, addresses myriad informal factors when determining if a precedent should be overruled.<sup>62</sup> One factor that weighs heavily is the type of interpretation at play: constitutional or statutory.<sup>63</sup> As Justice Scalia stated, “[the Court has] long recognized that the doctrine of *stare decisis* has special force where Congress remains free to alter what we have done.”<sup>64</sup> “Th[is] idea has long been advanced . . . because Congress has the power to pass new legislation correcting any statutory decision by the Court that Congress deems erroneous.”<sup>65</sup> “The traditional justification for this informal rule is that Congress can alter an incorrectly interpreted statute by amending it. Revisions of a constitutional decision, however, generally

---

53. See generally Spriggs & Hansford, *supra* note 52; see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“We have held that any departure from the doctrine of *stare decisis* demands special justification.”).

54. *Patterson*, 491 U.S. 164, 172 (1989) (quoting *Welch v. Tex. Dep’t of Highways and Pub. Transp.*, 438 U.S. 468, 494 (1978)).

55. *Id.* (quoting THE FEDERALIST, NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed. 1888)).

56. *Id.* (internal quotations omitted).

57. Spriggs & Hansford, *supra* note 52, at 1092 (internal citations omitted).

58. *Patterson*, 491 U.S. at 172.

59. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

60. S. DOC. NO. 112-9, at 2601–15 (2016).

61. Spriggs & Hansford, *supra* note 52, at 1092.

62. See generally *id.*

63. See *id.* at 1103.

64. *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992) (Scalia, J., concurring).

65. Spriggs & Hansford, *supra* note 52, at 1094.



require a constitutional amendment, and thus for most practical purposes only the Court can change a piece of constitutional doctrine.”<sup>66</sup> Therefore, the Court has been more reluctant to overturn statutory precedent, assuming instead that “if the legislature does not alter the Court’s interpretation of a statute, and thus silently acquiesces to it, this informal norm asserts the precedent should not be overruled.”<sup>67</sup>

Not only must a precedent meet the Court’s discerning eye, it must position itself before the Court to begin with. The only court that may overrule Supreme Court precedent is the Supreme Court itself. Therefore, in order to reevaluate a prior precedent, the Court must grant a petition for certiorari to a suitable case. Over the past thirty-five years, the Court’s docket has dropped by 56%, from a high of 167 opinions in 1981 to 74 opinions in 2015.<sup>68</sup> While a small docket helps create some stability in law, the sharp decline in the Court’s docket increases the burden for being heard.

## 2. Legislative Overruling

When the particularities of a case do not lend themselves to overruling past precedent, the Court has historically turned to the legislature to intervene.<sup>69</sup> Legislative intervention is one aspect of the separation of powers doctrine, creating a legislative check on the judicial system.<sup>70</sup> While Congress may not explicitly overturn Supreme Court opinions, it can create legislation that effectively nullifies Supreme Court precedent.<sup>71</sup> “The governing model of congressional-Supreme Court relations is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court’s interpretations.”<sup>72</sup>

However, the number of laws enacted by Congress has seen a significant downward trend since the early 1970s, falling from 772 in the 93rd Congress to 296 in the 113th Congress.<sup>73</sup> In particular, the number of overrides has fallen dramatically. Overrides have fallen “from an average of twelve overrides of Supreme Court cases in each two-year congressional term during the 1975-1990 period, to an average of 5.8 over-

---

66. *Id.*

67. *Id.* at 1094-95.

68. David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 151-53 (2010).

69. See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting) (“The ball is once again in Congress’ court to correct the error into which this Court has fallen.”).

70. See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 518-21 (2009).

71. See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (effectively nullifying the Court’s opinion in *Ledbetter*).

72. Hansen, *supra* note 52, at 208; see *infra* note 79 and accompanying text.

73. *Statistics and Historical Comparison*, GOVTRACK (Oct. 30, 2016), <https://www.govtrack.us/congress/bills/statistics>.

rides for each term from 1991-2000, and to a mere 2.8 average number of overrides for each term from 2001-2012.”<sup>74</sup>

Legislative override is an important tool in our system of government. For example, in 2007, the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>75</sup> a gender pay discrimination case. The Court held that, while Ms. Ledbetter had “demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear’s pervasive discrimination against women managers in general and Ledbetter in particular,” her claim was time-barred.<sup>76</sup> Justice Ginsburg’s dissent, read from the bench,<sup>77</sup> attacked the majority for their “cramped interpretation of Title VII” and called for legislative intervention, stating, “[o]nce again, the ball is in Congress’ court.”<sup>78</sup>

Two years later, Congress passed the Lilly Ledbetter Fair Pay Act, clarifying the statute of limitations on gender pay discrimination claims and making it easier for such claims to be brought.<sup>79</sup> Through Congress, the people spoke up and corrected the injustice they saw. This is exactly how legislative overrides should work. As the rates of legislative overrides fall, “Supreme Court interpretations of federal statutes are now very likely to be final,” and the people’s voice within the government is likely to become quieter.<sup>80</sup>

#### *F. Narrowing Precedent*

The Court’s high threshold for both accepting a petition for certiorari and overruling prior holdings, combined with a fast-paced world and an increasingly divided Congress, has severely limited the judicial system’s ability to overturn precedent.<sup>81</sup> When faced with precedent that does not quite reach the exacting threshold required for overruling and a Congress that is divided and deadlocked, courts lean toward a third option: distinguishing, rather than overruling, prior precedent.<sup>82</sup> Distinguishing prior decisions narrows the impact of the prior precedent. As cases become narrower and narrower, without any hope for congressional intervention, we may begin to see an increase in “precedential is-

---

74. Hansen, *supra* note 52, at 209. The rate of overrides likely fell even more dramatically than the numbers indicate, as the 1991 term included the Civil Rights Act of 1991, a single law which nullified ten Supreme Court cases.

75. 550 U.S. 618 (2007).

76. *Ledbetter*, 550 U.S. at 659–60 (Ginsburg, J., dissenting).

77. Barnes, *supra* note 52, at 1 (“The decision moved Justice Ruth Bader Ginsburg to read a dissent from the bench, a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women’s rights.”).

78. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

79. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

80. Hansen, *supra* note 52, at 224.

81. See discussion *infra* Section IV.

82. See generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–67 (2014).

lands,” or cases that are binding only on their exact factual scenario.<sup>83</sup> When courts are faced with precedent they cannot overrule and do not want to apply, they narrow the past precedent, chipping away at the coverage of the precedent.<sup>84</sup> As more and more courts chip away at the edges of a precedent, it becomes less and less applicable to cases at bar.<sup>85</sup> Eventually, the judicial system creates a precedential island: a precedent so narrow that it covers only its specific factual scenario. In creating these islands, it becomes more and more difficult to find a suitable case in which the Supreme Court can reexamine the necessity and propriety of keeping this precedential island on the books.<sup>86</sup>

## II. *DIRECT MARKETING ASSOCIATION V. BROHL*

### A. *Facts and Procedural History*

In an effort to address the low rate of use tax compliance,<sup>87</sup> the Colorado legislature passed a law (the Colorado Law) imposing a notice requirement on retailers that do not collect sales or use tax when selling to Colorado purchasers.<sup>88</sup> The Colorado Law went into effect on February 24, 2010.<sup>89</sup>

The Colorado Law imposes three obligations on non-collecting retailers.<sup>90</sup> The Colorado Law imposes three obligations on non-collecting retailers, including providing notice informing customers of their use tax obligations.<sup>91</sup> Failure to provide notices as required by the Colorado Law results in fines of five to ten dollars for each failure.<sup>92</sup>

---

83. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); see *Re*, *supra* note 82, at 1867.

84. See *Re*, *supra* note 82, at 1863.

85. For example, the Court's 1944 decision in *Korematsu v. United States*, 323 U.S. 214, upheld the executive order creating Japanese internment camps; however, as this factual scenario has yet to arise again, this precedent is still on the books as good law. See Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), <https://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html>.

86. *Id.*

87. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1132 n.1 (10th Cir. 2016) (noting that the Colorado Department of Revenue estimates “the compliance rate of remote retail sales” from retailers not required to collect taxes at 4%. In contrast, the sales tax compliance rate is 98.3%).

88. COLO. REV. STAT. § 39-21-112(3.5)(c)(II) (2017); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5 (2017).

89. COLO. REV. STAT. § 39-21-112(3.5).

90. 1 CCR § 201-1:39-21-112.3.5 (explaining that a non-collecting retailer is defined as a “retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax”).

91. Non-collecting retailers must: (1) “send a transactional notice to purchasers informing them that they may be subject to Colorado’s use tax”; (2) “send Colorado purchasers who buy goods from the retailer totaling more than \$500 an annual purchase summary with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes on those purchases”; and (3) “send the Department [of Revenue] an annual customer information report listing their customers’ names, addresses, and total amounts spent.” *Direct Mktg. Ass'n IV*, 814 F.3d at 1133 (citing COLO. REV. STAT. § 39-21-112(3.5)).

92. COLO. REV. STAT. § 39-21-112(3.5).

DMA is “a group of businesses and organizations that market products via catalogs, advertisements, broadcast media, and the Internet.”<sup>93</sup> The members of DMA are non-collecting retailers and thus subject to the Colorado Law.<sup>94</sup> In 2010, DMA filed a suit against the Colorado Department of Revenue (the Department) in federal district court, claiming the Colorado Law discriminates against and unduly burdens interstate commerce, thus violating the dormant Commerce Clause doctrine.<sup>95</sup> The federal district court granted DMA’s motion for summary judgment and enjoined the Department’s enforcement of the Colorado Law.<sup>96</sup> The Department appealed to the Tenth Circuit.<sup>97</sup>

The Tenth Circuit held that the federal district court lacked jurisdiction to hear the case, per the Tax Injunction Act<sup>98</sup> (TIA).<sup>99</sup> The TIA removes the federal courts’ jurisdiction in cases that would “enjoin, suspend or restrain the assessment, levy or collection” of state taxes.<sup>100</sup> The Tenth Circuit remanded the case with orders to dismiss the claims and dissolve the injunction.<sup>101</sup> After the Tenth Circuit denied a request for en banc review,<sup>102</sup> the federal district court dismissed the claims without prejudice and dissolved the injunction.<sup>103</sup> DMA brought two subsequent actions—a new suit against the Department in state district court and a petition for certiorari of the Tenth Circuit’s decision.<sup>104</sup>

While the state district court rejected DMA’s claim that the Colorado Law unduly burdened interstate commerce, it issued a preliminary injunction based on DMA’s facial discrimination argument.<sup>105</sup> Four and a half months later, the U.S. Supreme Court granted certiorari review of the Tenth Circuit’s decision.<sup>106</sup> The state district court subsequently stayed its proceedings, pending a ruling by the Supreme Court.<sup>107</sup>

---

93. *Direct Mktg. Ass’n IV*, 814 F.3d at 1132.

94. *Id.*

95. *Id.* at 1133–34.

96. *Id.* at 1134 (citing *Direct Mktg. Ass’n v. Huber (Direct Mktg. Ass’n I)*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175, at \*10–11 (D. Colo. Mar. 30, 2012), *rev’d sub nom.* *Direct Mktg. Ass’n v. Brohl*, 735 F.3d 904 (10th Cir. 2013), *rev’d*, 135 S. Ct. 1124 (2015)).

97. *Direct Mktg. Ass’n v. Brohl (Direct Mktg. Ass’n II)*, 735 F.3d at 904, *rev’d*, 135 S. Ct. 1124 (2015).

98. Tax Injunction Act, 28 U.S.C. § 1341 (2012) (“[D]istrict courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”).

99. *Direct Mktg. Ass’n IV*, 814 F.3d at 1134.

100. 28 U.S.C. § 1341.

101. *Direct Mktg. Ass’n IV*, 814 F.3d at 1134.

102. *Id.* (citing *Direct Mktg. Ass’n v. Brohl*, No. 12-1175 (10th Cir. Oct. 1, 2013)).

103. *Id.*

104. *Id.*

105. *Id.* (citing *Direct Mktg. Ass’n v. Colo. Dep’t of Revenue*, No. 13CV34855, at 1, 22–23 (Dist. Ct. Colo. Feb. 18, 2014)).

106. *Direct Mktg. Ass’n II*, 735 F.3d 904 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (2014).

107. *Direct Mktg. Ass’n IV*, 814 F.3d at 1134.

Approximately eight months later, the Supreme Court held that the Colorado Law addressed reporting requirements not taxation and therefore did not fall within the TIA's definition of "assessment, levy, or collection of any tax."<sup>108</sup> Thus, the suit was not barred from federal court by the TIA.<sup>109</sup> The case was reversed and remanded to the Tenth Circuit for further proceedings on the merits of DMA's dormant Commerce Clause claims.<sup>110</sup>

### B. *Opinion of the Court*

Judge Scott Matheson authored the opinion of the court.<sup>111</sup> Judge Neil Gorsuch filed a separate concurring opinion.<sup>112</sup> The Tenth Circuit held that the Colorado Law neither discriminates against nor unduly burdens interstate commerce.<sup>113</sup> The court began by providing an overview of the dormant Commerce Clause doctrine.<sup>114</sup> It then distinguished *Quill Corp. v. North Dakota*, determining that the bright-line rule *Quill* recognized is limited to tax collection.<sup>115</sup> Finally, the court analyzed DMA's claims under the dormant Commerce Clause, finding neither undue burden nor discrimination.<sup>116</sup>

After briefly reviewing the history of the dormant Commerce Clause and its proper application, Judge Matheson expressly pointed out that the decision reached in this case "need not be final."<sup>117</sup> Judge Matheson explained that if the Colorado Law is upheld, Congress may preempt it with its own law; however, if the Colorado Law is struck down, Congress may expressly authorize it with its own law.<sup>118</sup> "In that sense, the judicial decision determines which party would need to go to Congress to seek a different result."<sup>119</sup>

#### 1. Distinguishing *Quill*

As Judge Matheson succinctly stated, "The outcome of this case turns largely on the scope of *Quill*."<sup>120</sup> Judge Matheson referenced the numerous criticisms of *Quill*'s bright-line "physical presence" rule, including Justice Kennedy's concurrence in the opinion that remanded this case.<sup>121</sup> Justice Kennedy called *Quill* "a holding now inflicting extreme

---

108. 28 U.S.C. § 1341 (2012); *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1131 (2015).

109. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1132, 33.

110. *Id.* at 1134.

111. *Direct Mktg. Ass'n IV*, 814 F.3d at 1129.

112. *Id.* at 1147.

113. *Id.* at 1134.

114. *Id.*

115. *Id.*

116. *Id.* at 1147.

117. *Id.* at 1136.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1137.

harm and unfairness on the States.”<sup>122</sup> Judge Matheson expressly pointed out that, while never overruled, *Quill* has never been extended “beyond the realm of sales and use tax,” and declined to do so in this case.<sup>123</sup>

DMA argued that *Quill* has been cited outside the context of sales and use tax in three separate Supreme Court opinions.<sup>124</sup> However, Judge Matheson quickly rejected this argument, as “these opinions merely describe points of law in *Quill* and do not actually extend its holding to other contexts.”<sup>125</sup> He additionally cited to a Tenth Circuit case in which the court declined to apply the *Quill* rule to licensing and registration requirements imposed on out-of-state entities.<sup>126</sup> Judge Matheson concluded that *Quill*’s bright-line rule “applies narrowly to and has not been extended beyond tax collection” and therefore was inapposite in this case.<sup>127</sup>

## 2. DMA’s Claims

The lower court’s opinion granted summary judgment to DMA on their argument that the Colorado Law impermissibly discriminates against interstate commerce and their argument that the Colorado Law unduly burdens interstate commerce.<sup>128</sup> Judge Matheson addressed each in turn.

### a. Impermissible Discrimination

The district court determined that the Colorado Law was discriminatory because “the combination of state law<sup>[129]</sup> and *Quill* guarantees that [the Colorado Law] applies only to out-of-state retailers.”<sup>130</sup> After finding discrimination, the district court “subjected the law to strict scrutiny.”<sup>131</sup> “The court concluded the Department failed to carry its burden on the discrimination analysis and granted summary judgment to DMA” based on that conclusion.<sup>132</sup>

Judge Matheson reviewed the district court’s opinion *de novo*. First, Judge Matheson determined that the Colorado Law does not facially discriminate because the law’s differential treatment is based on whether a retailer collects sales or use tax, not whether the retailer is out-of-state.<sup>133</sup> Because facial discrimination is not the only manner in which a law can

122. *Direct Mktg. Ass’n III*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

123. *Direct Mktg. Ass’n IV*, 814 F.3d at 1137.

124. *Id.* at 1138.

125. *Id.*

126. *Id.* (citing *American Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000)).

127. *Id.* at 1139.

128. *Id.*

129. Colorado law requires that all retailers doing business in Colorado and selling to Colorado purchasers collect and remit sales tax. See COLO. REV. STAT. §§ 39-26-101 to -129 (2016).

130. *Direct Mktg. Ass’n IV*, 814 F.3d at 1140.

131. *Id.*

132. *Id.*

133. *Id.* at 1141–42.

discriminate against interstate commerce, Judge Matheson went on to address "the direct effect of the Colorado Law."<sup>134</sup>

Turning to the direct effect of the law, Judge Matheson rejected DMA's argument of discriminatory treatment.<sup>135</sup> He first rejected DMA's argument that *Quill* applies, as "*Quill* applies only to the collection of sales and use taxes, and the Colorado Law does not require the collection or remittances of sales and use taxes."<sup>136</sup> Then he rejected DMA's claim outright, reiterating that the Colorado Law is only discriminatory if it constitutes "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter and thereby alters the competitive balance between in-state and out-of-state" businesses.<sup>137</sup> The tax collection requirement on in-state retailers creates a hefty burden.<sup>138</sup> DMA did not establish that this burden was outweighed by the reporting requirement of the Colorado Law and, thus, the Colorado Law has no discriminatory effect.<sup>139</sup>

#### b. Undue Burden

Even nondiscriminatory laws must not unduly burden interstate commerce.<sup>140</sup> When turning to the undue burden analysis, Judge Matheson noted that the district court decided the issue of undue burden under *Quill*'s "physical presence" rule, and DMA limited its argument similarly.<sup>141</sup> The district court found an undue burden, "concluding that the burdens imposed by the Act and the Regulations are inextricably related in kind and purpose to the burdens condemned in *Quill*."<sup>142</sup>

However, as Judge Matheson once again pointed out, "*Quill* is not binding in light of the Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit taxes."<sup>143</sup> After pointing out that *Quill* is not controlling five more times, Judge Matheson stated that "[b]ecause the Colorado Law's notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, this ends the undue burden inquiry."<sup>144</sup>

---

134. *Id.* at 1142.

135. Before analyzing the direct effect, Judge Matheson rejects DMA's argument that non-adverse differential treatment between in-state and out-of-state entities violates the dormant Commerce Clause and its argument that the Colorado Law should be viewed in isolation. *Id.* at 1142-44.

136. *Id.* at 1144.

137. *Id.*

138. *Id.* at 1145.

139. *Id.*

140. *Id.*

141. *Id.* at 1146.

142. *Id.*

143. *Id.* at 1146-47.

144. *Id.* at 1147.

### 3. Conclusion

The majority found no dormant Commerce Clause violation and reversed the district court's grant of summary judgment, remanding for further proceedings consistent with its decision.<sup>145</sup> The Tenth Circuit concluded "by noting the Supreme Court's observation in *Quill* that Congress holds the 'ultimate power' and is 'better qualified to resolve' the issue of 'whether, when, and to what extent the States may burden interstate retailers with a duty to collect sales and use tax[.]'."<sup>146</sup>

#### C. Concurring Opinion

Judge Gorsuch wrote a separate concurring opinion "only to acknowledge a few additional points that ha[d] influenced [his] thinking in this case."<sup>147</sup> He acknowledged that which has thus far only been hinted at: "At the center of this appeal is a claim about the power of precedent."<sup>148</sup>

The dormant Commerce Clause doctrine "might be said to be an artifact of judicial precedent," and it is on the precedential power one of "the most contentious of all dormant [C]ommerce [C]lause cases" that the instant case rests.<sup>149</sup> *Quill* has been criticized for many years, by scholars as well as Supreme Court justices.<sup>150</sup> However, as Judge Gorsuch reminded, "*Quill* remains on the books and [the court] is duty-bound to follow it."<sup>151</sup> Regardless of the Court's confidence (or lack thereof) in the decision itself, it is a Supreme Court decision that the Court may never overrule.<sup>152</sup>

After determining that *Quill* must be followed, Judge Gorsuch pondered "what exactly *Quill* requires of us."<sup>153</sup> There have been numerous interpretations of *Quill*, but "[m]ost narrowly, everyone agrees that *Quill*'s holding forbids states from imposing sales and use tax collection duties on firms that lack a physical presence in-state."<sup>154</sup> The reporting requirement imposed by the Colorado Law "doesn't go quite that far."<sup>155</sup> Colorado even "suggests that its statutory scheme carefully and consciously stops (just) short of what *Quill*'s holding forbids."<sup>156</sup>

Judge Gorsuch went one step further and stated that the court's "obligation to precedent obliges [it] to abide not only a prior case's holding,

---

145. *Id.*

146. *Id.*

147. *Id.* (Gorsuch, J., concurring).

148. *Id.* at 1148.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*



but also to afford careful consideration to the reasoning (the 'ratio decidendi') on which it rests."<sup>157</sup> Judge Gorsuch emphasized that this consideration is particularly important when the prior decision "emanates from the Supreme Court."<sup>158</sup> It is the consideration of the court's *reasoning*, Judge Gorsuch explained, on which DMA's argument rests.<sup>159</sup> Judge Gorsuch summarized DMA's argument: the burdens imposed by the Colorado Law are "burdens comparable in their severity to those associated with collecting the underlying taxes themselves."<sup>160</sup> Judge Gorsuch disagreed with this analysis.<sup>161</sup>

When looking at the reasoning on which *Quill* rests, Judge Gorsuch clarified, it has very little to do with the burden of "laws commanding out-of-state firms to collect sales and use taxes."<sup>162</sup> Judge Gorsuch declared that "[I]t is instead and itself all about the respect due precedent, about the doctrine of stare decisis and the respect due a still earlier decision."<sup>163</sup> He concluded that it is "this distinction [that] proves decisive" in this case.<sup>164</sup>

In *Quill*, the Court decided to retain the physical presence rule established in *Bellas Hess*, "but did so only to protect the reliance interests that had grown up around it."<sup>165</sup> Judge Gorsuch stated that the *Quill* court went so far as the "expressly acknowledge[] that *Bellas Hess* very well might have been decided differently under contemporary Commerce Clause jurisprudence . . . ."<sup>166</sup> He pointed out that "The Court also expressly acknowledged that states can constitutionally impose tax and regulatory burdens on out-of-state firms that are more or less comparable to sale and use tax collection duties."<sup>167</sup> Judge Gorsuch determined that, as the *Quill* court called the distinction between regulatory burdens and collection burdens "artificial and formulistic," this court is "under no obligation to extend [*Bellas Hess*] to comparable tax and regulatory obligations."<sup>168</sup> He also pointed out the numerous lower courts that have held that *Quill* does not apply to regulatory duties.<sup>169</sup>

Judge Gorsuch went on to discuss another precedent that has "suffer[ed] as highly a distinguished fate,"<sup>170</sup> returning to 1922, when "the

---

157. *Id.*

158. *Id.* at 1148-49 ("Indeed, our court has said that it will usually defer even to the dicta (not just the ratio) found in Supreme Court decisions.").

159. *Id.* at 1149.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1149-50.

170. *Id.* at 1150.

Supreme Court held baseball effectively immune from federal antitrust laws and did so reasoning that the ‘exhibition[] of base ball’ by professional teams crossing state lines ‘didn’t involve commerce among the States.’”<sup>171</sup> As Judge Gorsuch explains, even “though it has long since rejected the reasoning of [the case], the Supreme Court has still chosen to retain the holding itself.”<sup>172</sup> It has done so “only out of respect for the reliance interests” that have risen up around the holding.<sup>173</sup> “And, of course, Congress has since codified baseball’s special exemption.”<sup>174</sup>

As Judge Gorsuch determined that *Quill* does not require the nullifying of the Colorado Law, he looked to “whether some other principle in dormant [C]ommerce [C]lause doctrine might.”<sup>175</sup> DMA raised the discrimination argument, “[b]ut any claim of discrimination is easily rejected.”<sup>176</sup> There is no evidence that the notice and reporting burdens on out-of-state retailers “compare unfavorably to the administrative burdens the state imposes on in-state” retailers.<sup>177</sup> “If anything, by asking [the court] to strike down Colorado’s law, out-of-state mail order and internet retailers don’t seek comparable treatment to their in-state brick-and-mortar rivals, they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity . . . .”<sup>178</sup>

Unfortunately, as Judge Gorsuch pointed out, it is actually this sort of competitive advantage that *Bellas Hess* and *Quill* create.<sup>179</sup> While the “mainstream of dormant commerce clause jurisprudence . . . is all about preventing discrimination between firms[,]” the jurisprudence stemming from *Bellas Hess* “guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume.”<sup>180</sup> And, while it seems antithetical to conclude that *Quill* requires the court to remove this benefit, Judge Gorsuch believed it to be “entirely consistent with the demands of precedent.”<sup>181</sup>

“After all, by reinforcing an admittedly ‘formalistic’ and ‘artificial’ distinction between sales and use tax collection obligations and other comparable regulatory and tax duties, *Quill* invited states to impose comparable duties.”<sup>182</sup> Just as the *Quill* court upheld the *Bellas Hess* rule to protect the reliance interests that had grown up around it, this court

---

171. *Id.* (alteration in original) (quoting *Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208–09 (1922)).

172. *Id.*

173. *Id.*

174. *Id.* (citing 15 U.S.C. § 26b (2012)).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1150–51.

181. *Id.* at 1151.

182. *Id.*

reaffirms the outer limits of *Quill*, protecting the reliance interests of state legislatures such as Colorado's who are "find[ing] ways of achieving comparable results through different means."<sup>183</sup>

Judge Gorsuch concluded by stating, "[W]hile some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law, a good many others disappear when reliance interests never form around them or erode over time."<sup>184</sup>

### III. ANALYSIS

#### A. The Formation of *Quill's* Precedential Island

##### 1. *Quill* Should Be Overruled

Change in this country is occurring at an exponential rate and *Quill* is a perfect example of this rapid movement. The rule from *Quill* came out of a world that was drastically different from today's world. Mail-order sales was a small industry in 1992, totaling only \$180 billion.<sup>185</sup> In the time it took for *Quill* to be addressed again, the fledgling area it protected had evolved into a \$3.16 trillion industry.<sup>186</sup> Brick-and-mortar stores have seen a steady decline in foot traffic every month for the last forty-eight months and in monthly sales for the last thirty-six months.<sup>187</sup> In a 2000 Pew Research Center survey, 22% of Americans had made online purchases; in a 2015 Pew Research Center survey, that percentage had increased to 79%.<sup>188</sup> "The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers."<sup>189</sup>

As Judge Gorsuch pointed out, "if it were ever thought that mail-order retailers were small businesses meriting (constitutionalized, no less) protection from behemoth brick-and-mortar enterprises, that thought must have evaporated long ago."<sup>190</sup> He pointed to "today's e-commerce retail leader, Amazon, [who] recorded nearly ninety billion dollars in sales in 2014 while the vast majority of small businesses rec-

---

183. *Id.*

184. *Id.*

185. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

186. *Id.* (Kennedy, J., concurring).

187. Andria Chang, *Holiday Sales Trends Heighten Brick-and-Mortar Woes*, EMARKETER (Jan. 6, 2017), <https://www.emarketer.com/Article/Holiday-Sales-Trends-Heighten-Brick-and-Mortar-Woes/1014990>.

188. Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, PEW RESEARCH CTR. (Dec. 19, 2016), <http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce>.

189. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1135. (Kennedy, J., concurring).

190. *Direct Mktg. Ass'n IV*, 814 F.3d 1129, 1151 n.1 (10th Cir.) (2016) (Gorsuch, J., concurring).

ordered no online sales at all.”<sup>191</sup> The pendulum has swung fully in the other direction. Far from ensuring out-of-state retailers do not bear an undue burden, the protection afforded to out-of-state retailers by *Quill*’s holding now equates to a “tax shelter.”<sup>192</sup>

The rationale behind protecting out-of-state retailers is no longer applicable. Indeed, by significantly reducing state tax revenue, the holding in *Quill* is not just out-of-date, but “a serious, continuing injustice faced by Colorado and many other States.”<sup>193</sup>

## 2. *Quill* Will Not Be Overruled Judicially

While dormant Commerce Clause doctrine decisions appear to be constitutional at first glance, they have significantly more in common with statutory decisions. The rationale behind stare decisis’s stronger hold on statutory decisions arises from the ability of Congress to correct any judicial interpretation it finds erroneous.<sup>194</sup> This rationale applies just as strongly to decisions under the dormant Commerce Clause doctrine.

Because the Constitution gives the power to regulate interstate commerce to Congress, Congress has the ability to correct any judicial interpretation under the dormant Commerce Clause doctrine.<sup>195</sup> Therefore, unlike other constitutional interpretations, Congress would not need to invoke a two-thirds majority in Congress and garner support from three-quarters of state legislatures to enact a constitutional amendment in order to overrule the Court.<sup>196</sup> This view is further supported by looking at *Quill* itself, which upheld *Bellas Hess*’s dormant Commerce Clause doctrine ruling, but overturned its Due Process Clause ruling.<sup>197</sup> In doing so, the Court noted, “[W]hile Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, . . . it does not similarly have the power to authorize violations of the Due Process Clause.”<sup>198</sup> Dormant Commerce Clause doctrine jurisprudence has many of its own idiosyncrasies; however, just as Congress can amend a statute it believes has been erroneously interpreted by the Supreme Court, Congress can write a statute sanctioning state legislation it believes the Supreme Court erroneously overturned. As such, decisions under the dormant Commerce Clause doctrine are imbued with the same “special force” of stare decisis as statutory decisions.

---

191. *Id.*

192. *Id.* at 1150.

193. *Direct Mktg. Ass’n III*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

194. Hansen, *supra* note 52, at 208.

195. *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422–427 (1946).

196. U.S. Const. art. V.

197. *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992).

198. *Id.* at 305.

This “special force” of stare decisis alone makes it difficult to raise *Quill* above the threshold required for overruling. This is where the speed of change occurring in society throws a wrench into the system. Normally, the Court will wait for “the legal system [to] find an appropriate case for th[e] Court to reexamine” the existing precedent.<sup>199</sup> However, the holding in *Quill* became outdated faster than the legal system could provide an opportunity for the Court to address it. The case was contentious when it was heard, as evidenced by the eleven amicus curiae briefs filed urging the Court to uphold *Bellas Hess*’s rule, including DMA and the eight amici curiae who filed briefs urging *Bellas Hess*’s reversal, one of whom was joined by twenty-six states’ attorneys general. The *Quill* opinion itself, while upholding *Bellas Hess*, expressly acknowledged “contemporary Commerce Clause jurisprudence might not dictate the same result were . . . [*Bellas Hess*] to arise for the first time today.”<sup>200</sup> *Quill*’s holding was out-of-date before its ink dried.

Because courts are loathe to apply a case in a way that comes to an unjust outcome, the lower courts continue to narrow *Quill*.<sup>201</sup> While this may provide more just outcomes for the time being, as *Quill* becomes narrower the number of cases that would be appropriate vehicles for the Court to reconsider its overruling will diminish. With the minuscule rate at which the Supreme Court grants certiorari review and the shrinking number of appropriate cases, it is less and less likely that the opportunity will arise for *Quill* to be judicially overturned.

### 3. *Quill* Will Not Be Overruled Legislatively

The Supreme Court called for congressional intervention in *Quill*’s majority opinion, stating “that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.”<sup>202</sup> “In this situation, it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of government.”<sup>203</sup> The following congressional session enacted 610 laws.<sup>204</sup> None addressed *Quill*.

The Tenth Circuit called for Congress to legislate over *Quill* in the instant case, quoting the majority’s plea in *Quill*.<sup>205</sup> While Congress rarely overrules precedent, the average age of those few that Congress has overruled in the last twenty-five years is 5 years.<sup>206</sup> The first call for leg-

199. *Direct Mktg. Ass’n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

200. *Quill Corp.*, 504 U.S. at 311.

201. *See, e.g., Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (declining to extend *Quill* to cover resale royalties provided for by California statute).

202. *Quill Corp.*, 504 U.S. at 318.

203. *Id.* at 318–19 (citations omitted).

204. *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited Oct. 30, 2016).

205. *See Direct Mktg. Ass’n IV*, 814 F.3d 1129, 1147 (2016).

206. Hansen, *supra* note 52, at 252–55.

islative intervention was placed twenty-four years ago. It has gone unanswered.

Since that first call, Congress has become increasingly divided. Prior to 2000, the majority of legislative overrides were bipartisan.<sup>207</sup> Now “we see a new, but rarer, phenomenon, partisan overriding.”<sup>208</sup> Partisan overrides are significantly more difficult, as they often require “an unusual set of events: a president, House, and Senate majority of the same party; a president with ample political capital; and enough crossover votes to beat a filibuster.”<sup>209</sup> Congress was unable to legislate over *Quill* during a time when Congress enacted twice as many laws as it does today and had an easier time gaining the support needed for legislative overrides, and when *Quill* was at the prime age for overruling. It is unlikely that the second call will produce different results.

#### 4. The Island of *Quill* is Formed

At least some members of the Supreme Court would like to address *Quill*.<sup>210</sup> However, it has yet to, and is unlikely to, encounter a case properly situated to overrule *Quill*. Furthermore, the Supreme Court’s call to legislate in this area has remained unanswered. The Tenth Circuit used the only option it had left: it distinguished *Quill* from *Direct Marketing*, thus narrowing *Quill*’s holding. The majority opinion states thirteen separate times that *Quill* does not apply.<sup>211</sup> It is in this emphatic distinguishing that a precedential island is formed.

#### B. The Rise of Precedential Islands

As change in society increases at a rapid rate, precedent may become outdated quicker than the courts can overrule it. Division in the legislative branch may cause the Court’s holdings to become the final word on statutory questions. While courts scramble to prevent unjust outcomes, the stability and predictability of stare decisis will slowly disappear. Stare decisis’s promise “that bedrock principles are founded in the law rather than in the proclivities of individuals” will be broken.<sup>212</sup>

This is best illustrated by taking a deeper look at *Direct Marketing*’s procedural posture. When *Direct Marketing* reached the Supreme Court, it had already been refiled in state court and the Colorado Law was pre-

---

207. *Id.* at 209.

208. *Id.*

209. *Id.* at 238.

210. See *Direct Mktg Ass’n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (“The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (White, J., concurring in part and dissenting in part).

211. See *Direct Mktg. Ass’n IV*, 814 F.3d at 1134, 1136–37, 1139, 1144–47.

212. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

liminarily enjoined.<sup>213</sup> Therefore, there were two possible outcomes from the Supreme Court's decision: the case would be barred from federal courts and the injunction in state court would stand, or the case would not be barred from federal courts and would be remanded to the Tenth Circuit for a decision on the merits.

The Supreme Court's opinion is intriguing for two reasons. First, the Court appears to like the Colorado Law. During oral arguments, Justice Scalia seemed shocked that this law is one-of-a-kind and could not understand why other states have not taken similar measures.<sup>214</sup> Justice Kennedy wrote a concurring opinion stating what an injustice the continuation of *Quill* and *Bellas Hess* jurisprudence has played on Colorado and the states, an issue which had no relation to the jurisdictional question before the Court.<sup>215</sup> Upholding the Colorado Law would allow other states to follow suit and, thus, lessen the fiscal burden placed on the states as more and more retailers limit their presence to the Internet.

Even more interesting, though, is the rationale for remanding the case. The Supreme Court reversed the Tenth Circuit's holding based on reasoning barely mentioned in either parties' briefings; the reporting requirements did not fall within the definitions in the TIA. DMA's main argument was that "[c]hallenges . . . brought by non-taxpayers who contest neither their own tax liability, nor anyone else's, and which present none of the elements of the prototypical TIA case, are not barred."<sup>216</sup> Colorado's main argument was that because DMA was seeking "to enjoin and restrain the *methods* Colorado uses to assess and collect its sales and use taxes," DMA's suit was barred.<sup>217</sup> However, the Supreme Court ultimately held that TIA did not bar federal jurisdiction because the reporting requirements were not part of assessment, levy, or collection as defined under the Act.<sup>218</sup> It went one step further and held that the words "enjoin, suspend, or restrain" in the TIA "capture[] only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection.'"<sup>219</sup>

The Court did not wish to send the case back to the court that had already preliminarily enjoined the Colorado Law. It did not want the Tenth Circuit to be bound by *Quill*. By basing its holding on the inapplicability of the TIA, the Court gave the Tenth Circuit an out. The emphatic statement that the Colorado Law was not a part of tax assessment, levy or collection, was all the reasoning needed to uphold the Colorado

---

213. *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, No. 13CV34855, at 1, 22–23 (Dist. Ct. Colo. Feb. 18, 2014) (order granting preliminary injunction).

214. Transcript of Oral Argument at 24, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2014) (No. 13-1032).

215. *Direct Mktg. Ass'n III*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

216. Brief of Petitioner at 15, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2015) (No. 13-1032).

217. Brief of Respondent at 13, *Direct Mktg. Ass'n III*, 135 S. Ct. 1124 (2015) (No. 13-1032) (emphasis added).

218. *Direct Mktg. Ass'n III*, 135 S. Ct. at 1133–34.

219. *Id.* at 1132.

Law. The Tenth Circuit was now free to distinguish *Quill*, which only applies to taxation, and find that the Colorado Law did not offend the dormant Commerce Clause doctrine. The Court shaped its unanimous opinion in a way that provided the outcome the nine Justices wanted. Instead of being “founded in the law,” as promised by stare decisis, this case turned on “the proclivities of individuals.”<sup>220</sup>

### CONCLUSION

While the precedential island of *Quill* is, at this time, unique, the systematic factors that led to its creation are not. If the pace of the modern world increases, precedent will become outdated more quickly and more frequently. If the American public, and thus the legislature, becomes more divided, the ability of Congress to correct statutory interpretations will diminish. If the country’s population grows and the number of petitions for certiorari increases, the percent of petitions the Court hears will decrease. Even if the Court disagrees with or wishes to clarify a precedent, the judicial system may move too slowly for an appropriate case to come before the Court. If these systematic factors remain, *Quill*, now a solitary island, may find itself with neighbors.

On December 12, 2016, the Supreme Court denied DMA’s petition for certiorari.<sup>221</sup> As Justice Kennedy stated, this “case does not raise this issue in a manner appropriate for the Court to address it.”<sup>222</sup> But will there ever be an appropriate case? If states continue to legislate around *Quill*, following in Colorado’s footsteps, the Court may never have a chance to address *Quill*. Some may argue that this is exactly how precedent is supposed to function: that a precedential island forms and then, over time, the sea of certainty washes it away and it disappears. But if times change too quickly and the islands form too rapidly, it may be that the sea of certainty will disappear instead.

KRISTIN L. ARTHUR\*

220. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

221. *Direct Mktg Ass’n v. Brohl*, 2016 WL 4565072, at \*1 (2016) (denying petition for certiorari).

222. *Direct Mktg Ass’n III*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

\* 2018 J.D. Candidate, University of Denver Sturm College of Law. I would like to thank Professor Alan Chen for his time and insight and Professor Nantiya Ruan for her continued support and encouragement. I would also like to thank the Staff Editors and Executive Board of *Denver Law Review* for their hard work; it is an honor to work with all of you.



